114 FERC ¶ 61,254
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Union Electric Company d/b/a AmerenUE Docket No. EC06-55-000
Aquila Piatt County Power L.L.C.

ORDER AUTHORIZING DISPOSITION AND
ACQUISITION OF JURISDICTIONAL FACILITIES

(Issued March 10, 2006)

1. On December 28, 2005, Union Electric Company d/b/a AmerenUE (AmerenUE), and NRG Audrain Generating, LLC (NRG Audrain) (collectively, Applicants) filed an application pursuant to section 203 of the Federal Power Act (FPA).[1] They request Commission authorization of the disposition and acquisition of certain jurisdictional facilities and generating facilities and approval of the rates, terms, and conditions for the sale of electric capacity and energy. The application requests authorization of a disposition of certain jurisdictional facilities related to the sale by NRG Audrain to Ameren UE of NRG Audrain's interest in the Audrain power generation facility (the Audrain Facility) (the Asset Sale). The Commission has reviewed the application pursuant to section 203 of the FPA, the Merger Policy Statement.[2] The Commission will

[1] 16 U.S.C. § 824b (2000) *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005) (EPAct 2005).

[2] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (Dec. 30, 1996); FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (Nov. 28, 2000), FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (Mar. 23, 2001), 94 FERC ¶ 61,289 (2001) (Order No. 642); *Transactions Subject to FPA Section 203*, Order No. 669, 71 Fed. Reg. 1,348 (Jan. 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2006), *reh'g pending*.

authorize the proposed transaction, as we find that it satisfies section 203 of the FPA and because it will not have an adverse effect on competition, rates, or regulation and is thus consistent with the public interest; also, the proposed transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. Accordingly, the Commission will authorize the requested transaction.

Background

2. The Audrain Facility is a 640 megawatt (MW) simple-cycle, natural gas-fired generating facility located in Audrain County, Missouri. The Audrain Facility consists of generating facilities and limited transmission facilities necessary to interconnect the generating facilities to the transmission grid.

3. AmerenUE provides retail electric service to approximately 1.2 million customers and natural gas service to approximately 130,000 customers in central and eastern Missouri. In addition to its own holdings, AmerenUE maintains a 40 percent interest in Electric Energy, Inc., the owner of a 1,005 MW generating facility. AmerenUE operates as a single control area with its affiliate AmerenCIPS and is a transmission-owning member of the Midwest Independent Transmission System Operator, Inc. (Midwest ISO).[3] AmerenUE makes sales at wholesale pursuant to its market-based rate tariff on file with the Commission. AmerenUE is a wholly-owned subsidiary of Ameren Corporation (Ameren), a holding company.[4] Ameren does not directly own or operate any facilities subject to the Commission's jurisdiction and does not own any significant assets other than the stock of its subsidiaries. Ameren is the parent of four public utility operating companies: Central Illinois Light Company d/b/a AmerenCILCO, AmerenCIPS, AmerenUE, and AmerenIP (collectively, the Ameren Operating Companies).

4. NRG Audrain, a limited liability company, is the direct owner of the Audrain Facility. NRG Audrain owns no significant assets other than the Audrain Facility and

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[3] All of the generation owned or controlled by AmerenUE is located in the Midwest ISO footprint and is subject to the Midwest ISO's Day 2 energy markets. A Day 2 market is a market that uses locational marginal pricing in its economic dispatch algorithm.

[4] The Application describes Ameren as a registered holding company under the Public Utility Holding Company Act of 1935, which has been repealed. *See* EPAct 2005 § 1263, 119 Stat. at 974; *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, 70 Fed. Reg. 75,592 (Dec. 20, 2005), FERC Stats. & Regs. ¶ 31,197 (2005).

related books and records. NRG Audrain is an indirect, wholly-owned subsidiary of NRG Energy, Inc. (NRG Energy). NRG Energy is an energy company primarily engaged in the ownership and operation of power generation facilities and the sale of energy, capacity, and related products in the United States and abroad. NRG Energy is also affiliated with NRG Power Marketing, Inc. and NRG Marketing Services LLC, power marketers authorized to sell energy and capacity at market-based rates.

5. Applicants state that the Asset Sales are under the "Asset Purchase and Sale Agreement by and between NRG Audrain Generating, LLC and Union Electric Company d/b/a AmerenUE."

Notice and Interventions

6. Notice of the Application was published in the *Federal Register*, 71 Fed. Reg. 3077 (2006), with interventions and protests due on or before January 23, 2006. The Missouri Joint Municipal Electric Utility Commission (Missouri Municipal) filed a timely motion to intervene and protest. Applicants filed an answer on February 7, 2006, to which Missouri Municipal filed a reply on February 17, 2006. On March 6, 2006, Applicants filed a response to Missouri Municipal's February 17 reply.

Discussion

A. Procedural Matters

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[5] the timely, unopposed motion to intervene serves to make the entity that filed it a party to this proceeding. Under Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,[6] answers to protests and replies to answers are not accepted unless otherwise ordered by the decisional authority. The Commission will accept Applicants' answer because it provided information that assisted in our decision-making process. The Commission is not persuaded to accept Missouri Municipals' February 17 reply or Applicants' March 6 response and will, therefore, reject them.

B. Section 203 Analysis

8. Section 203(a)(4) of the Federal Power Act, as amended, provides that "the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control, if it finds that the proposed transaction will be consistent with the public

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[5] 18 C.F.R. § 385.214 (2005).

[6] 18 C.F.R. § 385.213(a)(2) (2005).

interest."[7] The Commission's analysis under the Merger Policy Statement and Order No. 669 of whether a consolidation is consistent with the public interest has generally involved consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation. In addition, EPAct 2005 requires that the Commission approve a proposed transaction that "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."[8]

1. Effect on Competition

a. Horizontal Competitive Issues

i. Applicants' Analysis

9. Mr. Rodney Frame of Analysis Group, Inc. analyzed the effect of the Asset Sale on competition for the Applicants. Mr. Frame identifies non-firm energy as the relevant product associated with the transaction. He concludes that the Asset Sale will not harm competition.

10. As required by Order No. 642, Applicants present an Appendix A analysis in which Applicants' consultant states that, in order to provide a conservative estimate of the effects of the Asset Sale, his analysis treats the acquisition of the Audrain generation facility and the Raccoon Creek and Goose Creek generating facilities as a single transaction.[9] He states that this is a conservative approach because it causes larger transaction-induced changes than if he had examined the two transactions sequentially.[10]

11. In his analysis of non-firm energy markets, Applicants' consultant uses Economic Capacity and Available Economic Capacity, as defined in the Merger Policy Statement, as proxies to represent a supplier's ability to participate in the market.[11] The consultant

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[7] EPAct 2005 § 1289, 119 Stat. 982-83, to be codified at 16 U.S.C. § 824b(a)(4).

[8] *Id.*

[9] *See Union Electric Co. d/b/a AmerenUE*, Docket No. EC06-56-000, 114 FERC ¶ 61,255 (2006) (issued concurrently with instant order).

[10] Frame Affidavit, Appendix 4 at 19.

[11] Each supplier's "Economic Capacity" is the amount of capacity that could compete in the relevant market given market prices, running costs, and transmission availability. "Available Economic Capacity" is based on the same factors, but subtracts the supplier's native load obligation from its capacity and adjusts transmission availability accordingly.

states that because the three assets being transferred are peaking facilities that typically operate only during high demand periods, the study analyzes only the extreme peak during the summer for the Midwest ISO footprint.[12] Additionally, the consultant provides a separate analysis that focuses just on peaking facilities[13] in the Midwest ISO.[14]

12. Applicants' consultant states that in order to determine the market-clearing prices for the extreme peak in the summer, he used hour-by-hour forward price estimates provided by Ameren for the Ameren control area.[15] These estimates were developed using the Midas multi-region production cost model.[16] Because this analysis would show the Aquila Facilities and the Audrain Facility to be out-of-the-money[17] at all times, even the summer extreme peak, Applicants' consultant increased the summer extreme peak

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[12] Because the generation facilities at issue here and most of the generation capacity owned by AmerenUE and its affiliates are in the Midwest ISO region, and because the Midwest ISO has implemented Day 2 centralized energy markets and a centralized unit commitment and dispatch process, Mr. Frame use the Midwest ISO region as the relevant geographic market. Additionally, Mr. Frame notes that the Midwest ISO footprint was one of the geographic markets examined by the Commission in its recent order approving the merger of Duke Energy Corporation and Cinergy Corporation. 113 FERC ¶ 61,297 (2005) (*Duke/Cinergy*).

[13] Mr. Frame defines "peaking facilities" to include combustion turbines, internal combustion engines and pumped storage hydroelectric facilities that are "in-the-money" at the competitive market price level being analyzed. "In-the-money" means that the cost of running the facility is less than the revenue received from selling its power.

[14] Mr. Frame states that he provided such an analysis as a further demonstration that Ameren's acquisition of the Aquila Facilities and the Audrain Facility does not present competitive concerns by giving Ameren "too strong" a position with the Midwest ISO on the high-priced portion of the supply curve.

[15] Frame Affidavit, Appendix 4 at 31. Mr. Frame states that the Ameren control area contains the loads of Ameren's AmerenUE and AmerenCIPS subsidiaries, all of AmerenUE's electric generation capacity, virtually all of Ameren Energy Generating Company's electric generation capacity, Aquila's Raccoon Creek Energy Center and the Audrain Facility.

[16] The Midas production cost model develops price forecasts based on the cost of the marginal production unit plus a capacity scarcity adder. These results are then benchmarked using current market quotes for the Cinergy hub.

[17] This means that the cost of running the facility exceeds the revenue that would be earned from selling its power. Thus, it is not economical to operate.

market-clearing price to a level equal to the highest variable cost per megawatt-hour (MWH) of all three facilities being acquired. He says that this required an increase in the market-clearing price of approximately 18 percent. He used oil, coal and natural gas costs taken from the same model, and assumed a price of $1 per million British thermal units for nuclear plants.[18] He states that he conservatively assumed that zero imports could enter the Midwest ISO footprint from the outside and he counted Ameren generation in a control area neighboring the Midwest ISO as being in the Midwest ISO footprint.

13. Applicants' consultant maintains that under the Commission's procedures for Delivered Price Test analyses, only long-term (*i.e.*, greater than one year in duration) purchases and sales should be reflected in the analysis, and then only if operational control of generation capacity is conveyed. Applicants' consultant states that Ameren has dispatch rights to 176 MWs of generation owned by Soyland Power Cooperative under a power supply agreement; certain dispatch rights to 159 MWs of generation capacity owned by members of the Resale Power Group of Iowa; a right to call on the energy from 14 MWs of capacity owned by the municipal systems in Kahoka and Marceline, Missouri; and exclusive rights to dispatch 14 MWs of capacity owned by the Jackson, Missouri municipal system. In addition, he states that Ameren-CILCO purchases 50 MWs from customer-owned generation sources.[19]

14. Applicants' result for economic capacity for the Midwest ISO footprint showed a transaction-induced Herfindahl-Hirschmann Index (HHI)[20] increase of 24 points, from 535 to 559. For available economic capacity, Applicants found an 89 point increase, from 451 to 540. Their analysis for peaking facilities showed a transaction-induced increase of 139 points, from 480 to 619. Applicants state that each of these markets is unconcentrated post-transaction, indicating that no further inquiry is required.[21]

ii. <u>Protest</u>

15. Missouri Municipal objects to Applicants' Appendix A analysis on the grounds that the analysis does not consider transmission constraints, leading to an overly broad

[18] Frame Affidavit, Appendix 4 at 28.

[19] *Id.* at 32.

[20] HHI is a standard measure of market concentration.

[21] Frame Affidavit, Appendix 4 at 34. Mr. Frame states that had he not artificially increased the summer extreme peak competitive market-clearing price, the transaction-induced HHI change would be zero.

definition of the relevant geographic market.[22] If properly accounted for, says Missouri Municipal, these constraints would cause Applicants to fail the Commission's competitive screens.[23] Missouri Municipal further complains that Applicants' analysis does not take transmission constraints within the Midwest ISO into account, even though the analysis focuses on times of peak load, presumably when the system would be under the most stress and thus most congested. Missouri Municipal argues that Commission policies and obligations require that transmission constraints be taken into account in Appendix A analyses,[24] and thus Applicants are wrongly using the Midwest ISO footprint as the relevant geographic market to analyze the acquisition of the Aquila Facilities and the NRG Audrain facility.

16. Missouri Municipal argues that transmission constraints cause some or all of the Ameren control area to be separate geographic markets and should have been reflected in Applicants' analysis. It cites an earlier section 203 proceeding involving Ameren, Docket No. EC03-53-000, in which AmerenUE claimed that it could not depend on deliveries of power from the NRG Audrain facility within the Ameren control area due to constraints on Ameren's Bland-Franks line.[25] It further states that these transmission constraints apparently still exist, as evidenced by Applicants' testimony that only 578 MWs of the 640 MW Audrain Facility is deliverable to load. With respect to Aquila's Raccoon Creek Plant, Missouri Municipal cites constraints on Illinois Power's Coffeen-Roxford line, AmerenCIPS' Newton-Casey line and local 138 kV facilities. Missouri Municipal also cites Reliant's inability to deliver firm power from its Aurora Plant due to Reliant's inability to deliver power to the Ameren border as another example of transmission constraints relating to the Ameren control area.[26]

17. Missouri Municipal claims that the effect of transmission constraints on the Ameren system is also demonstrated by the Midwest ISO Transmission Expansion Plan

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[22] Missouri Municipal Protest at 5-9. Missouri Municipal argues that transmission constraints in the Ameren region make it difficult for utilities such as itself to reach economic long-term and short-term power supplies.

[23] *Id.* at 13-14.

[24] *Id.*

[25] *Id.* at 10 n.4 (referring to Ameren Energy Generating Company's initial brief dated Dec. 1, 2003, at 63). Docket No. EC03-53-000 culminated in a Commission order affirming that the proposed disposition of facilities would have no adverse effect on rates and regulation. *Ameren Energy Generating Co.*, Opinion No. 473, 108 FERC ¶ 61,081 (2004).

[26] Missouri Municipal Protest at 10.

2005 (MTEP 2005).[27] In the portion of the plan addressing the MidAmerican Interconnected Network (MAIN) region of the Midwest ISO, Tables 6.2-2 and 6.2-3 show Phase 1 and Phase 2 study results and projects that address limiting conditions. Missouri Municipal maintains that nearly all of the listed projects involve one of the Ameren control areas.[28]

18. Missouri Municipal claims that Ameren has effectively conceded before the Missouri Public Service Commission (Missouri Commission) that transmission constraints are relevant to the pending transaction, citing Ameren's statement that "[T]he proper forum to address any issues relating to the overall adequacy of Missouri's transmission system, or relating to how the Midwest ISO dispatch of generators (including the Midwest ISO's dispatch of the CTG's [combustion turbine generators] at issue here) within its footprint affects the transmission system, is at the Federal Energy Regulatory Commission . . . or at the Midwest ISO itself."[29] Missouri Municipal argues that the Midwest ISO's dispatch of generators is at issue in this case, because the economic dispatch of these facilities will depend on the offers made by Ameren operating the newly acquired facilities as part of Ameren's entire fleet of baseload, intermediate and peaking generation, which offers can and likely will vary from NRG's. Missouri Municipal concludes that the competitive significance of such changed dispatch is relevant to the Commission's analysis of the section 203 application.[30]

19. Missouri Municipal argues that the record in a past Ameren proceeding, Docket No. EC04-81-000, indicates that the transaction proposed here would violate the Delivered Price Test.[31] That transaction involved an increase of 203 MWs of capacity under Ameren's control and resulted in screen failures for economic capacity in the Ameren control area for all seasons/load levels. Missouri Municipal concludes that the current transaction's increase of nearly 1,300 MWs of capacity is highly likely to produce more serious Appendix A screen violations.

20. Missouri Municipal suggests that the Commission require Applicants to supplement their filing to include and analyze transmission constraints. It also requests

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[27] *Available at* http://www.midwestiso.org/publish/Folder/3e2d0_106c60936d4_-75210a48324a?rev=1 (main report titled "MTEP 05 - Board Approved June 2005").

[28] *Id.* at 11.

[29] *Id.* at 12.

[30] *Id.* at 12-13.

[31] *Id.* at 13-14 (citing *Ameren Corp.*, 108 FERC ¶ 61,094 at P 27 (2004) (reporting Delivered Price Test results)).

an investigation and a technical conference on the effect of transmission constraints on geographic markets and Ameren's generation market power. Missouri Municipal volunteers to take part in the solutions to these problems in the regions where it operates.[32]

iii. Applicants' Answer

21. Applicants disagree with Missouri Municipal's allegation that the existence of transmission constraints merits the use of a narrower geographic market than the Midwest ISO market used in Applicants' analysis. They rebut this claim by stating that Missouri Municipal offers no credible evidence to show that any such transmission constraints exist. For example, Missouri Municipal gives no indication that it or any of its members have been denied transmission service within the Midwest ISO region since the Midwest ISO's Day 2 market commenced operations. Accordingly, Applicants contend that Missouri Municipal's claims are nothing more than unsupported allegations that provide no basis for the relief it seeks.[33] Applicants further contest Missouri Municipal's claim by noting that the same MTEP 2005 referenced by Missouri Municipal indicates that all load within the Midwest ISO is deliverable except for the International Transmission Zone.

22. Applicants disagree with Missouri Municipal's claim that the MTEP concludes that the Ameren transmission system is constrained. The tables Missouri Municipal cites, 6.2.2 and 6.2.3, do not show any conditions that result in binding constraints. The conditions referred to in these tables are, in all but one case, NERC Category C, or multiple, contingencies, and further, the Midwest ISO has determined that all load in the control areas for the Ameren companies is deliverable in spite of these contingencies.[34] Applicants further argue that in the Day 2 market, the Midwest ISO uses security constrained economic dispatch over the entire Regional Transmission Operator (RTO) footprint and can dispatch around any limitation that may arise.[35]

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[32] *Id.* at 14-15.

[33] Applicants' Answer at 11-12.

[34] Applicants' Answer at 12. Applicants note (*id.* at 13) that the only NERC Category B contingency listed in table 6.2.2, involves a low voltage facility that does not affect the availability of transmission service. Referring to NERC Standard TPL-002-0, a Category B contingency is an "event resulting in the loss of a single element," whereas a Category C contingency is/are "event(s) resulting in the loss of two or more (multiple) elements."

[35] *Id.* at 13.

23. Applicants argue[36] that Missouri Municipal's references to earlier Ameren proceedings are irrelevant to the instant application. Applicants note that the methodology used by AmerenUE in Docket No. EC03-53-000 is no longer used in the Midwest ISO with the advent of Day 2 markets. The Midwest ISO has effectively replaced the old methodology with deliverability tests for generators and load under the Midwest ISO Open Access Transmission and Energy Markets Tariff. Docket No. EC04-81 is similarly irrelevant, because the Midwest ISO's Day 2 markets were not in operation then, either.

24. Applicants argue that, given the absence of transmission constraints, using the Midwest ISO region as the relevant geographic market is consistent with Commission precedent. They state that the Commission has found that the use of an RTO region is appropriate when evaluating generation market power issues under both sections 203 and 205.[37] Applicants cite *PSEG Waterford Energy LLC*[38] and *Duke Energy Corp. and Cinergy Corp*.[39] as cases in which the Commission found the RTO to be the appropriate geographic market for section 203 purposes. In *AEP Power Marketing Inc*.,[40] and *Illinois Power Co. d/b/a AmerenIP*,[41] the Commission found that where an RTO has a Day 2 market with centralized dispatch and Commission-approved market monitoring functions, the presumed proper geographic market is the RTO region.[42] Applicants further claim that it would make no sense to find that the Midwest ISO is the appropriate geographic market for determining whether a company has market power in one context (section 205 market-based rate proceedings) and then require the company to use a different geographic market when evaluating the same question in another (section 203 proceedings). This is especially the case given that AmerenUE will file a notice of change in status relating to their market-based rate authority pursuant to Order No. 652[43] to reflect the acquisition of the Aquila and NRG facilities.

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[36] *Id.* at 13-17.

[37] *Id.* at 17-18.

[38] 112 FERC ¶ 61,308 (2005) (*PSEG Waterford*).

[39] 113 FERC ¶ 61,297 (2005) (*Duke/Cinergy*).

[40] 107 FERC ¶ 61,018 (2004).

[41] 110 FERC ¶ 61,408 (2005).

[42] Applicants' Answer at 18-19.

[43] *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

25. Applicants maintain that nothing in *Duke/Cinergy* and *Exelon Corp.*[44] supports the use of a different geographic market for purposes of their Application. Those orders endorsed the use of locational submarkets as the relevant geographic market only when there are binding transmission constraints. In the case at hand, Applicants claim that there is no credible evidence of transmission constraints, and that the Commission accepted the analysis presented by the applicants in *Duke/Cinergy*, which concluded that that the Midwest ISO market, as a whole, was unconcentrated.[45] Applicants emphasize that the analysis in *Duke/Cinergy* supports the use of the Midwest ISO as the relevant geographic market, and explain that those applicants ultimately used a more limited geographic market (the Midwest ISO region excluding the Wisconsin-Upper Michigan System (WUMS) region, Iowa, Minnesota, and LG&E (Midwest ISO Submarket) to be conservative.[46] Applicants consider their analysis of peaking capacity to be similarly conservative.[47]

26. In addition to defending their main analysis, Applicants offer additional evidence that the Asset Sale will not hurt the Midwest ISO markets. They claim that the Asset Sale would pass all market power screens even if they were to use the smaller Midwest ISO Submarket that Duke/Cinergy used as their conservative relevant geographic market. In comparing their case to *Duke/Cinergy* in the context of the size of the Midwest ISO Submarket and its concentration, Applicants consider Ameren's, Aquila's, and NRG's generating capacity as measured by the HHI. In the Duke/Cinergy case, the consultant, Dr. William Hieronymus, determined that that the Midwest ISO Submarket concentration during summer extreme peak conditions had an HHI of 828.[48] Applicants state that when they adopt Dr. Hieronymus' summer extreme peak market-clearing price of $250, Ameren's share of Economic Capacity in the Midwest ISO Submarket is 15.0 percent, whereas the combined share of the NRG and Aquila Facilities is 1.35 percent.

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[44] 112 FERC ¶ 61,011 (2004).

[45] Applicants' Answer at 22.

[46] *Id.*

[47] Applicants also note that while the *Duke/Cinergy* analysis may have excluded WUMS and certain other regions that were deemed transmission constrained, the analysis in that case did not find any Ameren company control area to be transmission constrained. Furthermore, Applicants in the instant case point out that the *Duke/Cinergy* analysis included the Ameren companies in the Midwest ISO Submarket and the Midwest ISO-PJM Midwest markets considered. *Id.* at 21-22.

[48] This analysis is based on a total of 95,778 MWs of Economic Capacity.

Approximating the HHI change for the Asset Sale as 2ab,[49] Applicants say that the HHI change due to this transaction for the Midwest ISO Submarket is 42.[50] Likewise, for Available Economic Capacity, Applicants find a transaction-induced HHI change of 44. Applicants thus conclude that the Asset Sale passes the Commission's competitive screens for the Midwest ISO Submarket.[51]

27. Applicants challenge Missouri Municipal's suggestion that the Midwest ISO Independent Market Monitor cannot address any market power issues that might arise from AmerenUE's acquisition of the Aquila and NRG facilities. The Independent Market Monitor can mitigate market power abuse, including the ability to develop screens and other indices to determine whether market power abuse or anti-competitive behavior has occurred, identify and report anticompetitive behavior to the Commission and other agencies, and recommend appropriate penalties.[52]

28. Applicants answer Missouri Municipal's claim with respect to the proceeding before the Missouri Commission by stating that the language quoted from the proceeding was not an "admission" by AmerenUE that transmission constraints exist, but merely a clarification as to the proper forum in which to address such contentions. Moreover, Applicants dismiss Missouri Municipal's claim of competitive harm from altered dispatch as the type of unsupported and extraneous claims that the Commission warned against injecting into section 203 proceedings.

29. For these reasons, Applicants assert that neither additional studies nor a technical conference are necessary. They contend that the transmission solutions that Missouri Municipal claims are necessary are beyond the scope of this proceeding.

iv. <u>Commission Determination</u>

30. As discussed below, we find that Applicants have shown that the combination of their generation capacity resulting from the Asset Sale will not harm competition in any relevant market.

31. Applicants' studies of the Midwest ISO footprint and the Midwest ISO Submarket

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[49] Where a and b are the pre-transaction shares of the combining assets.

[50] Applicants claim that even this change overstates the effect of the transaction on competition, because it assumes that Ameren will be acquiring all of NRG's generating capacity in the Midwest ISO Submarket, whereas there are 18 MWs that Ameren will not be acquiring.

[51] Applicants' Answer at 23-26.

[52] *Id.* at 20.

demonstrate that the Asset Sale does not adversely affect horizontal competition. Under the tests for both Economic Capacity and Available Economic Capacity, Applicants have shown that neither the Midwest ISO footprint nor the Midwest ISO Submarket is concentrated either before or after accounting for the Asset Sale. Accordingly, the Asset Sale passes the Commission's horizontal competition screen under either analysis.

32. Although Missouri Municipal opposes Applicants' definition of the relevant geographic market, arguing that transmission constraints cause some or all of the Ameren control areas to be separate geographic markets, its arguments are unconvincing. First, the relevant market proposed by Missouri Municipal is not recognized by the Midwest ISO, which has not designated the Ameren control areas Narrow Constrained Areas.

33. Second, Missouri Municipal cites certain constraints previously identified by Applicants, but offers no evidence about when or how often those constraints are now binding, nor has it provided any analysis showing that the constraints are significant enough to define a geographic market smaller than the MISO Submarket. The mere existence of a constraint, of unidentified frequency and significance, does not establish the existence of a relevant geographic market

34. Third, even if we were to assume that the Ameren control areas were sufficiently constrained to cause them to be considered a relevant geographic market for this proceeding, transmission expansion construction currently underway by AmerenUE would alleviate such constraints. The MTEP Appendix A[53] demonstrates that AmerenUE is in the process of building a 345kV transmission line between Callaway and Franks, with an expected in-service date of December 1, 2006, which will reduce the congestion on the Bland-Franks line cited by Missouri Municipal.[54] This transmission expansion meets Missouri Municipal's stated goal for the technical conference it proposes that the Commission conduct -- to address the transmission constraints Missouri Municipal claims adversely impact competitive conditions.[55] This also undermines Missouri Municipal's contention that the Ameren control areas are sufficiently constrained so as to be considered a separate geographic market for purposes of section 203.

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[53] *See* MTEP Appendix A at A-3, *available at* http://www.midwestiso.org/publish/Document/3e2d0_106c60936d4_-75180a48324a/MTEP05_Appendix_A.pdf?action=download&_property=Attachment.

[54] In the interim, we expect the Midwest ISO's market monitor to alert us promptly of any circumstances that may warrant mitigation beyond that already imposed under the Midwest ISO's tariff.

[55] Missouri Municipal Protest at 14.

2. Vertical Competitive Issues

i. Applicants' Analysis

35. Applicants state that the Asset Sale will not create vertical market power. They say that the Commission's concern with regard to vertical market power generally arises in circumstances, not present here, in which the combined entity may restrict potential downstream competitors' access to upstream supply markets or increase potential competitors' costs. In addition, Applicants state that AmerenUE and other Ameren Operating Companies have transferred functional control of their transmission facilities to the Midwest ISO, mitigating vertical market power concerns.[56]

ii. Commission Determination

36. In mergers combining electric generation assets with inputs to generating power (*e.g.*, natural gas transmission or fuel supply assets) competition can be harmed if a merger increases the merged firm's ability or incentive to exercise vertical market power in wholesale electricity markets.[57] Here, Applicants have shown that the proposed transaction does not raise any of these concerns. AmerenUE and the other Ameren Operating Companies are members of the Midwest ISO, and have transferred functional control of their transmission facilities to the Midwest ISO. Consistent with our finding in *PSEG Waterford*, we find that turning over functional control of an applicant's transmission facilities to a Commission-approved RTO mitigates vertical market power concerns. The Commission notes that no protester raised vertical market power issues in this proceeding.

3. Effect on Rates

i. Applicants' Analysis

37. Applicants argue that the Asset Sale will have no impact on wholesale sales or existing FERC-jurisdictional transmission rates. Applicants state that AmerenUE provides jurisdictional wholesale service to various customers in Missouri, and that while the specific terms of each relevant contract vary, in each instance the rates charged are market-based rates negotiated pursuant to AmerenUE's market-based rate authority. Applicants maintain that these contract rates are not affected by AmerenUE's cost of service and, thus, will not be affected by the Asset Sale. Applicants argue that the Asset Sale will have no adverse effect on the existing FERC-jurisdictional transmission service rates of AmerenUE or the other Ameren Operating Companies, because these entities are

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[56] Application at 12-13, citing *PSEG Waterford,* 112 FERC ¶ 61,308 at P 32.

[57] *See* Order 642, FERC Stats. & Regs. ¶ 31,111 at 31,904.

all members of the Midwest ISO and their transmission rates are determined in accordance with the provisions of the Midwest ISO Energy Market Tariff.[58]

ii. Commission Determination

38. The Commission finds that Applicants have shown that the proposed transaction will not adversely affect wholesale power rates or transmission rates. Consistent with Order 669,[59] because AmerenUE provides wholesale service at market-based rates negotiated pursuant to AmerenUE's market-based rate authority, and these contract rates are not affected by AmerenUE's cost of service, AmerenUE's wholesale customers will not be adversely affected by the proposed transaction. With respect to transmission rates, the Commission notes that AmerenUE and the other Ameren Operating Companies are already members of the Midwest ISO and their transmission rates are determined in accordance with the provisions of the Midwest ISO's Energy Market Tariff.

4. Regulation

a. Applicants' Analysis

39. Applicants argue that the proposed transaction will not have any effect on the nature of federal or state regulation. Applicants state that AmerenUE and the other Ameren Operating Companies will continue to be subject to the Commission's jurisdiction under Part II of the FPA. Applicants state that the Asset Sale will not affect state regulation because (1) the Missouri Public Service Commission (Missouri Commission) must review and approve certain aspects of the financing associated with the transaction, and (2) following the completion of the Asset Sale AmerenUE, including the Audrain Facility, will continue to be subject to the jurisdiction of the Missouri Commission with respect to retail electric rates.[60]

b. Commission Determination

40. Applicants have demonstrated that the proposed transaction does not raise any concerns with respect to regulation. We find that the proposed transaction will not adversely affect federal regulation because Applicants and the Power Purchase Agreement will continue to be subject to the Commission's jurisdiction. Furthermore, Applicants have shown that the proposed transaction will not impair the ability of any state commission to regulate any of Applicants. We note that no state commission protested the proposed transaction.

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[58] Application at 13-14.

[59] FERC Stats. & Regs. ¶ 31,200 at P 166.

[60] Application at 14-15.

5. Cross Subsidization

a. Applicants' Analysis

41. Applicants verify that the proposed transaction does not result in, now or in the future: (1) transfers of facilities between a traditional utility associate company with wholesale or retail customers served under cost-based regulation and an associate company; (2) new issuances of securities by a traditional utility associate company with wholesale or retail customers served under cost-based regulation for the benefit of an associate company; (3) new pledges or encumbrances of assets of a traditional utility associate company with wholesale or retail customers served under cost-based regulation for the benefit of an associate company; or (4) new affiliate contracts between non-utility associate companies and traditional utility associate companies with wholesale or retail customers served under cost-based regulation, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA. Applicants therefore contend that there is no need for a detailed examination of cross-subsidization and encumbrance concerns as to the Asset Sale.

b. Commission Determination

42. As demonstrated by the description above, the proposed transaction does not raise any concerns with respect to cross subsidization and has therefore complied with the requirements of Order No. 669.[61]

The Commission orders:

(A) The proposed section 203 transaction is authorized upon the terms and conditions and for the purposes set forth in the application.

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(C) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(D) The Commission retains authority under sections 203(b) and 309[62] of the FPA to issue supplemental orders as appropriate.

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[61] Order 669, FERC Stats. & Regs. ¶ 31,200 at P 169.

[62] 16 U.S.C. § 825h (2000).

(E) Applicants must submit their proposed final accounting within six months of the consummation of the transaction. The accounting submission should provide all transaction-related accounting entries made to the books and records of AmerenUE along with appropriate narrative explanations describing the basis for the entries.

(F) Applicants shall notify the Commission within 10 days of the date that the transaction has consummated.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.